UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: John D. GERMAN Z-248-70-0998

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2458

John D. GERMAN

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 12 March 1987, an Administrative Law Judge of the United States Coast Guard at Charleston, South Carolina, revoked Appellant's merchant mariner's document upon finding proved the charge of misconduct. The charge was supported by two specifications, both of which were found proved. The first specification alleged that at or about 1515 on December 6, 1986, while serving aborad the USNS SIRIUS, moored at the Naval Station, Norfolk, Virginia, the Appellant, acting under the authority of the captioned document, wrongfully had in his possession a dangerous drug, namely marijuana. The second specification alleges that Appellant, at the sae time and date and while serving in the same capacity, wrongfully had in his possession an alcoholic beverage, namely beer, in violation of a ship's standing order.

The hearing was held at Charleston, South Carolina on 12 March 1987.

At the hearing Appellant represented himself and answered admit to the first specification and no contest to the second specification.

The Investigating Officer introduced in evidence six exhibits and no witnesses were called to testify.

In defense, Appellant made an unsworn statement in his own behalf.

After the hearing the Administrative Law Judge rendered a

decision in which he concluded that the charge and specifications had been proved, and entered a written order revoking all valid documents issued to Appellant.

The complete Decision and Order was served on 26 March 1987. Appeal was timely filed on 20 April 1987. No brief or memorandum was filed in support of the notice of appeal, however the appeal is considered perfected due to Appellant's pro se status.

FINDING OF FACT

Appellant is the holder of a Coast Guard merchant mariner's document which authorizes him to serve as Ordinary Seaman, Wiper, Steward's Department, Food Handler.

On 6 December 1986, Appellant was serving as Steward Utilityman aboard the USNS SIRIUS under the authority of his Coast Guard Merchant Mariner's Document Number 248700998.

At or about 1515, 6 December 1986, while serving as aforesaid and on board the USNS SIRUS, moored at the Naval Station, Norfolk, Virginia, the Appellant did wrongfully have in his possession a dangerous drug, to wit: marijuana.

At or about 1515, 6 December 1986 while serving as aforesaid and on board the USNS SIRUS, moored at the Naval Station, Norfolk, Virginia, the Appellant did wrongfully have in his possession an alcoholic beverage, to wit: beer.

The possession of marijuana and beer was in violation of the standing orders of the USNS SIRIUS, then in effect on 6 December 1986.

BASES OF APPEAL

Appellant appears to raise three grounds for appeal:

1. Ineffective waiver of counsel.

2. Failure to advise Appellant of the serious nature of the charge and specifications, resulting in improvident answers.

3. Violation of his Fourth Amendment rights against improper search and seizure.

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant argues that he did not make a knowing and intelligent waiver of the right to be represented by counsel. He further claims in his appeal that he agreed to represent himself not knowing the seriousness of the charge and specifications against him. He claims he was highly confused by the use of legal terminology at the hearing. I disagree.

Appellant has the right to be represented by professional counsel, or any other person desired, according to 46 CFR 5.519 (a)(1). Furthermore, under this regulation, the Administrative Law Judge is required to advise the Appellant of this right, on the record, at the hearing.

Appellant was initially advised of his right to counsel and the serious nature of the proceedings, in person, by he Coast Guard Investigating Officer in February 1987. The possible consequences of finding the marijuana specification proved were explained to the Appellant, who acknowledged this explanation. Appellant was encouraged to seek professional counsel by the Investigating Officer at that meeting. (Transcript at 15, 16).

This initial advisement of rights is corroborated by Appellant's attempt to retain counsel, namely Mr. Uricchio, prior to the hearing. Appellant indicated at the hearing that he had initially retained counsel on payment of a $500.00 retainer fee. Appellant further indicated that an additional $2,000.00 retainer would be required. Appellant stated that he could not afford this amount, and appeared at the hearing without professional counsel. According to Appellant, counsel refunded $200.00 of the initial retainer fee. (Transcript at 4.5).

The Administrative Law Judge then fully discussed the serious nature of the charge and specifications, including the possible result that if the marijuana specification was found proved the Administrative Law Judge would have no alternative, save the experimentation exception which was explained, but to revoke Appellant's document. (Transcript at 3,4). The Transcript indicates that this discussion took place in plain language without the use of complex legal terminology.

This was followed by the Administrative Law Judge's explanation of Appellant's right to counsel. In addition to professional counsel, the Administrative Law Juge indicated that Appellant could be represented by "a friend, a representative from your union, or any other person of your choice". He further advised Appellant that he could represent himself without counsel, if he so desired. Again, this discourse took place without the use of complex legal terminology. (Transcript at 4).

At this point, the Administrative Law Judge attempted to secure the presence of the retained counsel. According to the Investigating Officer, Mr. Uricchio's secretary indicated that he was out of town. (Transcript at 6,7). The Administrative Law Judge had inquiries made of the local Legal Aid office to see if they represented mariners at suspension and revocation proceedings. The reply was that they did not represent mariners at such proceedings. The Legal Aid office did provide the name of a local attorney who did make such representations. This name was provided to the Appellant. (Transcript at 6). At this point, the Administrative Law Judge offered to continue the hearing to allow the Appellant an opportunity to seek counsel. (Transcript at 7). With this offer and the previous discussions concerning the possible revocation of his document, Appellant chose to represent himself and proceed with the hearing that was in progress. (Transcript at 8).

It is quite clear from the regulations that the Appellant has no right to appointed counsel in these proceedings. Appeal Decision 2327 (BUTTS), citing the language in Appeal Decision 2089 (STEWART):

"The government's responsibility with regard to counsel in aministrative proceedings is to inform the person of his right to be represented by counsel at his own expense and to allow him to be represented by counsel should he so choose. The government can not be held in error because Appellant, being aware of his right and of the serious consequences involved in his exercise of the right, chose not to be represented by counsel (as is also his right)." The Administrative Law Judge acted prudently and reasonably in not only advising the Appellant of his right to counsel, but also, taking steps to obtain counsel for the Appellant. Appellant chose not to avail himself of the opportunity to have the hearing continued so that he could obtain counsel. Appellant knowingly, intelligently and voluntarily waived his right to counsel. Appeal Decision 2119 (SMITH); Appeal Decision 1826 (BOZEMAN).

II

Appellant's letter of appeal states that he was confused by the use of complex legal terminology and failed to appreciate the serious nature of the proceedings. As a ground for appeal, I view this as an assertion that his answers were improvidently made. I find no merit in this issue.

Pursuant to 46 CFR 5.527(a), the Administrative Law Judge is required to read each charge and specification to the Appellant and obtain a specific answer to each. Failure to answer requires entry of a denial of the charge and specification. The Administrative Law Judge made the required reading of the charge and ech specification to the Appellant in this case. (Transcript at 12).

The Appellant, at this point, is required to make a specific answer to each charge and specification in accordance with 46 CFR 5.527(b). The only acceptable answers allowed under the regulation are deny, admit, or no contest. The Administrative Law Judge properly advised the Appellant of the form in which his answers had to be made. Appellant then answered "admit" to the charge and specification dealing with wrongful possession of marijuana. Appellant answered "No Contest" to the charge and specification dealing with the wrongful possession of alcoholic beverages. (Transcript at 11, 12).

The Administrative Law Judge advised the Appellant, in accordance with 46 CFR 5.527(c), that on the strength of his answers alone, the Administrative Law Judge was entitled to make a finding of "proved" to each specification. The Administrative Law Judge explained that based on Appellant's answers, the Coast Guard was not required to put forward any evidence to support the charge and specifications. The Administrative Law Judge indicated that on the strength of the Appellant's answers, he would have no alternative but to revoke Appellant's document. Appellant was asked by the Administrative Law Judge if he understood each of these explanations. Appellant indicated that he understood each of the explanations. (Transcript at 13). A review of the transcript reveals that this discourse also took place in plain language without use of complex legal terminology. The record is devoid of any indications throughout that the Appellant was confused, disoriented, or could otherwise not comprehend the nature and effect of the answers h provided. At no time did the Appellant request to withdraw his answers.

Appellant was fairly put on notice by the Administrative Law

Judge at the hearing of the serious nature of the proceedings, the effect of his pleas of admit and no contest with respect to the Government's burden of proof and the possible suspension or revocation of his documents. This is all the law requires. Appeal Decision 2376 (FRANK); Appeal Decision 2317 (KONTOS); Appeal Decision 2132 (KEENAN); Appeal Decision 1712 (KELLY).

III

Finally, Appellant contends for the first time that the search of his stateroom aboard the USNS SIRIUS and the resulting seizures violated his Fourth Amendment rights under the United States Constitution. His challenge is not properly before me for review for two reasons.

First, this issue was not raised at the hearing where evidence and testimony of witnesses from both sides could have resolved the matter. It therefore cannot be raised for the first time on appeal. 46 CFR 5.701(b)(1). Appeal Decision 2376 (FRANK) admit and no contest. It is clearly established that provident answers of this type are sufficient, in and of themselves, to support a finding of proved. FRANK, supra; Appeal Decision 1712 (KELLY); Appeal Decision 2362 (ARNOLD). All answers except a denial operate as an admission of all matters of fact as charged and averred. All non-jurisdictional defcts and defenses are similarly waived by these answers. Appeal Decision 2385 (CAIN): FRANK, supra; ARNOLD, supra; Appeal Decision 1203 (DODD). Furthermore, an appeal may not set aside an answer of admit or no contest unless it was found to be improvidently made. FRANK, supra; ARNOLD, supra; Appeal Decision 1631 (WOLLITZ). I have already determined that Appellant's answers were providently made at the hearing.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations. I find no reversible error.

ORDER

The order of the Administrative Law Judge dated 12 March 1987 at Charleston, South Carolina, is AFFIRMED.

J.C. IRWIN
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 14th day of October, 1987.

2. PLEADINGS

.06 Burden of Establishing Defense

defense not raised at hearing will not be considered on appeal

3. HEARING PROCEDURE

.12 Attorney

appointed, no right to in S & R proceeding

right to attorney, waiver of

.30 Counsel

appointed, no right to in S & R proceeding

right to counsel, waiver of

.71 Notice

of seriousness of charge/consequences

.74 Objections

failure to make, as waiver

.83 Plea/Answer

admit, effect of

no contest, effect of

admit/no contest, may not be contravened on appeal

4. PROOF AND DEFENSES

.17 Counsel

appointed, no right to in S & R proceeding

right to counsel, waiver of

.25 Defense

defense not raised at hearing will not be considered on appeal

4. PROOF AND DEFENSES

.92 Plea/Answer

admit, effect of

no contest, effect of

admit/no contest, may not be contravened on appeal

5. EVIDENCE

.06 Answer/Plea

admit, effect of

no contest, effect of

admit/no contest, may not be contravened on appeal

.65 Objections

failure to make, as waiver

.95 Search and Seizure

issue waived by answer/plea

issue not raised at hearing will not be considered on appeal

.60 Log entries

admissibility of

.98 Shipping articles

admissibility of

13. APPEAL AND REVIEW

.10 Appeals

defense not raised at hearing will not be considered on appeal

issue not raised at hearing will not be considered on appeal

provident answer/guilty plea may not be contravened on

Appeal Decisions Cited: 2385 (CAIN), 2376 (FRANK), 2362 (ARNOLD), 2327 (BUTTS), 2317 (KONTOS), 2268 (HANKINS), 2132 (KEENAN), 2119 (SMITH), 2089 (STEWART), 1826 (BOZEMAN), 1712 (KELLY), 1631 (WOLLITZ), 1203 (DODD).

NTSB Cases Cited: None.

Federal Cases Cited: None.

Statutes Cited: 46 U.S.C. 7702

Regulations Cited: 46 CFR 5.519(a)(1), 46 CFR 5.527(a), 46 CFR 5.527(b), 46 CFR 5.527(c), 46 CFR 5.701, 46 CFR 5.701(b)(1).

***** END OF DECISION NO. 2458 *****